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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DOCTOR NUI LOA PRICE, *et al.*,
Petitioners,

v.

STATE OF HAWAII., *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the State of Hawaii and its officers are entitled to Eleventh Amendment immunity from suit by native Hawaiians to enforce the trust established by Section 5(f) of the Hawaii Admissions Act?

2. Whether private parties, in possession of property allegedly belonging to the trust established by Section 5(f) of the Hawaii Admissions Act, are engaged in state action, subjecting them to suit under 42 U.S.C. § 1983?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DOCTOR NUI LOA PRICE, THE HOU HAWAIIANS[1] AND KAMUELA PRICE,

Petitioners,

v.

STATE OF HAWAII., WILLIAM W. PATY, individually and as Chairman of the board of Land and Natural Resources of the State of Hawaii, HERBERT K. APAKA, JR., MOSES W. KEALOHA, J. DOUGLAS ING, JOHN ARISUMI, and HERBERT ARATA, individually and as members of the Board of Land and Natural Resources of the State of Hawaii, JOHN WAIHEE, individually and as Governor of the State of Hawaii, THE HONOLULU SAILORS HOME SOCIETY *, a Hawaii non-profit corporation, HFSL CORP., a Hawaii corporation, d.b.a. HARBOR ASSOCIATES, PETER S. SMITH d.b.a. SMITH DEVELOPMENT CORP., GLENN K. OKADA, d.b.a. G.K.O. CORP., and HONFED BANK, a federal savings bank,

Respondents.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioners DOCTOR NUI LOA PRICE, THE

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[1] The Hou Hawaiians is an unincorporated *ohana* or native Hawaiian tribal body.

HOU HAWAIIANS and KAMUELA PRICE, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS IN THE CASE

The opinion of the U.S. Court of Appeals for the Ninth Circuit sought to be reviewed, *Price v. State of Hawaii*, C.A. Nos. 90-15117 and 90-15863, was filed July 11, 1991. Petitioners and State Respondents filed timely motions for rehearing. On August 8, 1991, the opinion was amended on denial of Petitioner's motion for rehearing, App., p. 35; and the opinion, as amended, was published in full as *Price v. Hawaii*, 939 F.2d 702 (9th Cir. 1991). App., p. 1. The opinion was again amended by order filed on September 18, 1991. App., p. 16.

JURISDICTION

The decision of the Court of Appeals was announced in the opinion, filed July 11, 1991, App., p. 1, and judgment was entered. App., p. 37. On July 21, 1991, Respondents, WILLIAM PATY, *et al.*, filed a timely motion for rehearing. Respondents' motion for rehearing was denied by order filed October 30, 1991. App., p. 36. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254(1), provided the petition is filed within 90 days of entry of the judgment of the Court of Appeals, as required by 28 U.S.C. § 2101(c).

The 90 day time period is tolled by the filing of the timely motion for rehearing. Revised Rules of the Supreme Court, Rule 13.4; *Missouri v. Jenkins*, ___ U.S. ___, 110 S.Ct. 1651, 109 L.Ed.2d 31, 50-51 (1990). The

petition is deemed filed if mailed bearing a postmark dated on or before January 28, 1992, the last day for filing. Revised Rules of the Supreme Court, Rule 29.2.

STATUTES INVOLVED

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

42 U.S.C.S. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Pub.L. 86-3, 73 Stat. 4 (1959), § 5(f) provides:

> The lands granted to the State of Hawaii by subsection (b) of this section and the public lands retained by the United States under subsection (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the

> income therefrom shall be held by said State as a *public trust for the support of the public schools* and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

STATEMENT OF THE CASE

This is a civil rights case brought in the U.S. District Court for the District of Hawaii, pursuant to 42 U.S.C. § 1983. App., p. 18. The District Court has jurisdiction as conferred by 28 U.S.C. § 1343. Petitioner THE HOU HAWAIIANS is a native Hawaiian[2]

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[2] Whenever the term "native Hawaiian" is used herein it means "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778" as that term is

ohana or tribal body. MAUI LOA, hereditary chief of the *ohana*, is a native Hawaiian, qualified and on the waiting list for an award of a homestead lease, pursuant to the Hawaiian Homes Commission Act of 1920 ("HHCA"), July 21, 1921, ch. 42, 42 Stat. 108 *et seq.*

Petitioner KAMUELA PRICE, father of MAUI LOA and member of the elder council of THE HOU HAWAIIANS, is not a native Hawaiian. He appears here as a representative and advisor to the native Hawaiian members of the *ohana* and on their behalf.

The federal right which Petitioners claim has been denied them by Respondents, acting under color of state law, is their right as native Hawaiian special beneficiaries under the trust established by Congress in § 5(f) of the Hawaii Admissions Act, Pub.L. 86-3, 73 Stat. 4 (1959) (hereafter "Admissions Act"). App., pp. 18-19.

Respondents PATY, APAKA, KEALOHA, ING, ARISUMI, and ARATA, are the chairman and members of the Board of Land and Natural Resources of the State of Hawaii, generally charged with the duty under state law of managing the § 5(f) trust corpus. App., p. 19. These respondents are collectively called "state respondents."

Respondent HONOLULU SAILORS' HOME SOCIETY ("HSHS") is in constructive possession of the subject property as lessor under a master development lease to Harbor Properties, Ltd, as general partner of Puget-Pacific, a limited partnership. Respondents HFSL CORP., SMITH, and OKADA, are the successors of the lessee under the master lease. Respondent HONFED BANK, is a mortgagee.

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defined by Section 201(a)(7) of the Hawaiian Homes Commission Act of 1920.

The complaint alleges:

1. That on March 21, 1893, the provisional Government of the Hawaiian Islands executed and delivered a deed for a certain parcel of land to respondent HSHS for use as a sailors' home upon the condition that "if the herein described lot or any part thereof shall at any time cease to be used for the purposes of a Sailors' Home, the whole of said lot shall forthwith revert to the Government of the Hawaiian Islands." App. p. 19.

2. That said condition has been violated and the land reverted to the State of Hawaii as trustee of the § 5(f) trust as successor to the interest of the government of the Hawaiian Islands. App. p. 20.

3. That the private respondents have wrongfully been receiving rents and profits from the subject property which monies rightfully belong to the corpus of the § 5(f) trust. App., p. 20.

4. That the state respondents have breached their duty to recover the lost rents and profits and possession of the subject property on behalf of the trust. App., p. 20.

The complaint seeks an adjudication that the subject property is part of the corpus of the § 5(f) trust and judgment against the private parties and state officials, in their individual capacities, for damages to the trust for lost rents and profits. The complaint also seeks appointment of Petitioner, MAUI LOA, or some other suitable person as co-trustee with respect to the recovered property. App., pp. 20-21.

Claims against State of Hawaii and State Officials in their Official Capacities.

Respondents State and state officials moved to dismiss the complaint or in the alternative for summary judgment. Their arguments that Petitioners lack stand-

ing and that § 5(f) does not create a federal right enforceable by 42 U.S.C. § 1983 were rejected by the district court. App., p. 28. However, the district court dismissed the complaint against the State and state officials on eleventh amendment grounds, App., pp. 22-28, 34, pursuant to F.R.Civ.P., Rule 12(b)(6). App., p. 28. The district court ruled that suit was precluded against the state directly and against the state officials in their official capacities, because an adjudication of title to state land was in actuality a suit against the state itself. Further that such an adjudication was merely to establish the basis for a money judgment, citing *Green v. Mansour*, 474 U.S. 64, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985) and *Papasan v. Allain*, 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). App., pp. 24-26.

Petitioners conceded below that *Hans v. Louisiana*, 134 US. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), *Edelman v. Jordan*, 414 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), and *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978), compelled dismissal of the complaint against the state of Hawaii. However, Petitioners noted that four members of this court had stated in *Welch v. Dept. of Highways and Public Transportation*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987), that *Hans v. Louisiana* was wrongly decided. Therefore, Petitioners preserved this issue to be decided by this court.

Petitioners also argued that this suit alleges a breach of a trust that was established by the very act of congress that conferred sovereignty upon the state. The § 5(f) was a condition of statehood, which had to be approved by the voters of the Territory.

Petitioners also argued that the prayer for adjudi-

cation of title was in the nature of prospective relief against the state permitted by *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

The ruling with respect to petitioners' claim for damages against the state officials in their individual capacities was reversed by the Court of Appeals. App., pp. 7-8. However, the Court of Appeals affirmed dismissal of claims against the state and state officials acting in their official capacities. App., pp. 6-7.

Claims against private parties.

The private respondents joined in the state' motions but also moved to dismiss on the additional grounds that they, as private parties, were not acting under color of state law. App., p. 28.

Petitioners, citing *U.S. v. Price*, 383 U.S. 787, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966), *Addickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 787 (1970), *Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980) and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), argued that the private parties were acting jointly with the state officials and were therefore engaged in state action.

The district court ruled that "Plaintiffs have clearly failed to plead facts that would assert a § 1983 claim against the private defendants." App., p. 29. In addition, the district court engaged in a long discussion of pendent party jurisdiction and concluded that the court lacked jurisdiction absent a valid § 1983 claim. Petitioners did not then and do not now assert any claim against the private parties under state law.

On appeal, Petitioner Kamuela Price additionally cited *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). The court

of appeals affirmed, holding that no "connection between the State and private appellees is pled here." App. p. 12.

LEGISLATIVE HISTORY

On July 7, 1898, Hawaii was annexed as part of the United States of America, by Joint Resolution of Annexation, Res. No. 55, 30 Stat. 750. The Republic of Hawaii ceded title to approximately 1.7 million acres of public lands to the United States. The relevant portion of the Resolution states:

> "Whereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, Government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining:
> Therefore,
>
> "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian Islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the

property and rights hereinbefore mentioned are vested in the United States of America."

After accepting sovereignty over the territory of the Hawaiian Islands and title to the public lands, in fee simple absolute, without restriction or reservation, Congress added a provision exempting Hawaiian lands from the general law of the United States with respect to public lands, as follows:

> "The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

In compliance with this provision, Congress provided that the Territorial government should control and manage Hawaiian public lands, rather than the Department of the Interior, as had been the case in the other 49 states. Section 91 of the Hawaiian Organic Act, April 30, 1900, ch. 339, 31 Stat. 141, provides as follows:

> "Sec. 91. That the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July seventh, eighteen hundred and ninety-eight, shall be and remain in the possession, use

> and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii. And all moneys in the Hawaiian treasury, and all the revenues and other property acquired by the Republic of Hawaii since said cession shall be and remain the property of the Territory of Hawaii."

While § 91 of the Hawaiian Organic Act was amended from time to time, the foregoing language remained part of the law until statehood in 1959.

But Congress was not indifferent to the injustice that had been done to the native Hawaiian peoples, who had been displaced from their land by powerful economic interests that they could not resist. The Hawaiian Homes Commission Act of 1920 was enacted to remedy this injustice.

Congress was animated by a purpose to restore some of Hawaii's land to the native Hawaiian people, "because," as the Committee chairman declared, "the Hawaiians were deprived of their lands without any say on their part, either under the Kingdom, under the republic or under the United States government." *Proposed Amendments to the Organic Act of the Territory of Hawaii, Hearings before the House Committee on Territories*, 66th Cong., 2nd Sess. 170 (Feb. 3, 4, 5, 7 and 10, 1920). The Committee report reiterated that the native Hawaiian population "assumed that the . . . [land] . . . was being held in trust by the crown for their benefit," and recognized that the land indeed never had been transferred and that the rebel Republic

of Hawaii had "arbitrarily seized" the lands. H.R. Rep. No. 839, 66th Cong., 2nd Sess. 5 (1920). In floor debates, Del. Jonah Kuhio Kalanianaole argued for the legal and moral rights of the native Hawaiian people to have land set aside for their benefit. 59 Cong.Rec. 7453 (1920).

The bill that finally became the Act was introduced in the next Congress. In a second set of hearings, the chairman of the Committee on Territories noted that the motivating factor behind the legislation was similar to that behind similar legislation relating to Indian tribes: "because we came to this country and took their land away from them . . . . [W]hy can we not do the same thing for the Hawaiians whose land was taken away from them . . . ." *Proposed Amendments to the Organic Act of the Territory of Hawaii, Hearings on H.R. 7257 before the House Committee on Territories*, 67th Cong., 1st Sess. 141 (June 9 and 10, 1921.

The Act set aside approximately 200,000 acres of land, designated as "available lands", *id.*, § 203, for homesteads to be leased to native Hawaiians at a rental of one dollar a year for 99 years. *Id.*, §§ 207-208. A "native Hawaiian" was defined as follows:

> Sec. 201. (a) That when used in this title --
> * * *
>
> (7) The term "native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778;" *Id.*, § 201.

Unfortunately, over the years, the Hawaiian Homestead program was not as successful as might have been imagined. To further address the problem, at the

time of statehood, Congress imposed certain trust provisions upon the Hawaiian public lands.

On March 18, 1959, Congress enacted the Hawaii Admissions Act, approving statehood for Hawaii. Section 5(a) of the Act granted the proposed state government all of the land, legal title to which was held in the name of the Territory. With certain exceptions as set forth in Sections 5(c) and 5(d), sections 5(b) and 5(g) granted the proposed state all of the lands which had been ceded to the United States at the time of annexation, including the "available lands" under the Hawaiian Homestead program. This grant was subject to the trust imposed by Section 5(f) of the Act, in part, "for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended." This comprised a total of approximately 1.4 million of the original 1.7 million acres.

The 300,000 acres reserved to the United States by Sections 5(c) and (d) included the military reservations, government installations, and other property in actual use by the United States. Most of this acreage is comprised of Hawaii National Park on the Islands of Hawaii and Maui. See Hawaii Admissions Act, § 16.

This grant was a rather extraordinary concession to the proposed new state. No other had been treated so generously upon admission to the Union. Indeed, the Secretary of the Interior so noted in his comments to the proposed statehood bill.

> "In line with the preceding comments, I recommend the inclusion in H.R. 49 of provisions which would permit Hawaii to enter into the Union on a basis similar to that on which the western continental States were admitted. The Federal Govern-

> ment has retained the public lands for development and disposal in a manner consistent with the interests of the nation as a whole. At the same time it has granted to the incoming States from two to four sections per township of public lands, or from one-eighteenth to one-ninth of the public lands, for school purposes, in addition to other grants for internal improvements. Similar grants should be made in the case of Hawaii." H. Rep. No. 194, 80th Cong., 1st Sess. 16 (1947)

The only consideration exacted from the proposed state for this special treatment was the promise to use the land so granted for the "betterment of the conditions of the native Hawaiians."

Under Section 4, of the Admissions Act, Congress required that:

> "As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That . . . all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act."

The Act provided for ratification of statehood by the voters of the proposed state, as follows:

> "(b) At an election designated by proclamation of the Governor of Hawaii, which may be either the primary or the general election held pursuant

to subsection (a) of this section, or a territorial general election, or a special election, there shall be submitted to the electors qualified to vote in said election, for adoption or rejection, the following propositions:

* * *

"'(3) All provisions of the Act of Congress approved _____ (Date of approval of this act) reserving rights or powers to the United States, *as well as those prescribing the terms or conditions of the grants of lands or other property therein made to the State of Hawaii are consented to fully by said State and its people.*'

"In the event the foregoing propositions are adopted at said election by a majority of the legal votes cast on said submission, the proposed constitution of the proposed State of Hawaii, ratified by the people at the election held on November 7, 1950, shall be deemed amended as follows: * * * article XI shall be deemed to include the provisions of section 4 of this Act; and section 8 of article XIV shall be deemed amended so as to contain the language of the third proposition above stated in lieu of any other language * * *.

"In the event the foregoing propositions are not adopted at said election by a majority of the legal votes cast on said submission, the provisions of this Act shall cease to be effective.

* * *

The election was held on June 27, 1959 and statehood and the above proposition were ratified by the voters. 73 Stat. c74. On August 21, 1959, President Eisenhower signed the proclamation admitting Hawaii

into the Union as the 50th state. *Id.*

HISTORY OF LITIGATION

In 1980, Petitioners filed suit against the U.S. Department of Justice to compel the United States to perform its obligation under § 5(f) to enforce the trust. *Price v. Dept. of Justice*, CV. NO. 80-2794 (D.D.C.). This case was settled by an agreement of the parties which established the Federal-State Task force on the Hawaiian Homes Commission Act. See *Report to United States Secretary of the Interior and the Governor of the State of Hawaii*, Federal-State Task Force on the Hawaiian Homes Commission Act (August, 1983), p. 7. Petitioner, KAMUELA PRICE was appointed by Gov. Ariyoshi as one of the members of the Task Force. On August 15, 1983, the Task Force issued its report, finding, in part:

> "[A]s of May 31, 1983, 7,901 applicants continue to wait for homestead awards. In addition the State has not identified with precision the Hawaiian Home lands that constitute the assets of the trust; it has not at all times accounted accurately for revenues associated with trust lands; it has not maintained auditable financial records and statements; and, it has entered into conveyances and encumbrances of Hawaiian Home lands that have not been authorized by law." *Id.*, at p. 22.

The Task Force also found that the state legislature had improperly reduced the blood quantum of aboriginal blood required for successorship to a homestead lease from 50% to 25% and made other unauthorized amendments to HHCA. *Id.*, at 25. The Task Force recommended that Congressional approval be obtained for

these changes. *Id.* at 27. Petitioner KAMUELA PRICE dissented from this recommendation, as follows:

> "On behalf of the Hou Hawaiians and other native Hawaiian beneficiaries whom I represent, I must dissent from any and all recommendations that the United States Congress be requested to change or modify the HHCA at this time.
>
> "Congressional action on amendments to the HHCA or new Federal legislation pertaining to the HHCA should be deferred until all eligible beneficiaries currently on DHHL waiting lists are awarded leases to their homestead land. Once these beneficiaries have their leases, the native Hawaiian homesteaders and leaseholders should vote on whether any new HHCA legislation or amendment is desired. The results of this vote should be presented to Congress with any proposed Federal legislation or amendment changing the HHCA.
>
> "I fear that at this time Congress might inadvertently or otherwise abort the HHCA or change it in a manner detrimental to the best interests of the beneficiaries." *Id.*, at 69.

One excuse for the delay in awarding homesteads under HHCA has been the lack of funding to provide infrastructure. Petitioners have maintained that it was Congress' intention that income from the § 5(f) trust should be used for this purpose.

Therefore, in *Price v. Hawaii*, 764 F.2d 623 (9th Cir. 1985), *cert. den. sub nom. The Hou Hawaiians v. Hawaii*, 475 U.S. 1091 (1986), Petitioners brought suit against the State of Hawaii and then Gov. George Ariyoshi, in his official and individual capacities, seeking

to compel use of a portion of the § 5(f) revenue to provide the needed infrastructure. Jurisdiction of the federal district court was predicated on 28 U.S.C § 1362. The district court dismissed the action, and the Court of Appeals affirmed, holding that § 1362 does not confer jurisdiction, because the Hou are not an "Indian tribe or band with a governing body duly recognized by the Secretary of the Interior."

Nevertheless, the court ruled that a native Hawaiian does have standing to bring suit against state officials for prospective injunctive relief and that such officials are not protected from suit by the Eleventh Amendment. *Price v. State of Hawaii, supra*, 764 F.2d at 629-30. The Court suggested that Petitioners could file suit pursuant to 42 U.S.C. § 1983. *Id.*, at 630.

In *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990), *cert.denied sub nom. Akaka v. Price*, (U.S. No. 90-1941) Petitioners sued the trustees of the Office of Hawaiian Affairs, individually, for damages, pursuant to § 1983, for allegedly using proceeds of the § 5(f) trust to benefit all Hawaiians as distinguished from *native* Hawaiians. The district court dismissed the action. On appeal, the Court of Appeals reversed, holding that state officers are not protected by the Eleventh Amendment from suit against them individually for damages for breach of the § 5(f) trust. *Price v. Akaka, supra*, 928 F.2d at 826-8. The Court of Appeals made the additional important ruling that trust property remained impressed with the trust restrictions as long as it remains in the control of any agency or department of the state. *Id.*, at 827.

On remand, the defendants again moved to dismiss, this time on grounds of qualified immunity. A ruling on

that motion is now pending in the district court. Defendants have stated that they will file an interlocutory appeal from an adverse ruling on that motion.

In *Price v. State of Hawaii* (hereafter called *Price v. Paty*), 921 F.2d. 950 (9th Cir. 1990), Petitioners brought suit against the Chairman and members of the Board of Land and Natural Resources of the State of Hawaii for an accounting of assets and income from the § 5(f) trust and also for injunctive relief to prevent the them from depositing the trust income into the state general fund. The district court granted summary judgment against plaintiffs, and the Court of Appeals affirmed. The Court of Appeals held that defendants are not accountable as ordinary trustees, because § 5(f) does not require the high standard of fiduciary duty often imposed by courts on trustees of native Americans. *Price v. Paty, supra*, 921 F.2d at 955. Nevertheless, the Court of Appeals again rejected the Eleventh Amendment immunity argument again advanced by defendants. *Id.* at p. 958.

In *Ulaleo v. Paty*, 902 F.2d 1395, another group of native Hawaiians brought suit against the members of the Board of Land and Natural Resources, in their official capacities. The suit complained of an exchange of 27,807 acres of valuable § 5(f) trust land with excellent potential for geothermal energy development by the board for 25,807 acres of worthless Campbell Estate land that had been covered by lava in recent volcanic eruptions. The Campbell Estate was not made party to the suit. The Court of Appeals ruled that the suit was in reality one for retroactive relief or damages that was precluded by the Eleventh Amendment.

Napeahi v. Paty, 921 F.2d 897 (9th Cir. 1990) is a case very similar to the instant one. Another group of

native Hawaiians brought suit against the chairman of the Board of Land and Natural Resources, in his official capacity, to compel him to adjust a shoreline certification that had resulted in an addition of 1.75 acres of what plaintiffs alleged was § 5(f) trust land to the Hyatt Waikoloa Beach Resort Hotel property. The private land owners were not made parties.

After trial, the district court found that the land in question was not § 5(f) trust property. The Court of Appeals reversed and remanded for further findings by the district court. However, since the private land owners were not made parties, it is not clear to Petitioners what relief might be awarded by the district court upon a finding that the land is § 5(f) trust land. A declaration to that effect would not be binding on the land owners. Moreover, Mr. Paty could hardly be ordered to adjust the shoreline boundary without due process to the private land owners.

In *Paty v. Napeahi*, 112 S.Ct. 278 (1991), the state officials unsuccessfully sought review of this decision, arguing that native Hawaiians lack standing to bring suit to enforce the § 5(f) trust.

REASONS WHY THE WRIT SHOULD ISSUE

If the writ is granted, Petitioners will argue that the State of Hawaii and its officers are not entitled to sovereign immunity as provided by the Eleventh Amendment because sovereign immunity was only granted to the state *on the condition* that it would assume its responsibility as trustee for the native Hawaiians, under § 5(f) of the Hawaii Admissions Act.

Further, the people of the state accepted the terms and conditions of the trust imposed by § 5(f), by ratifying proposition 3 at the special statehood election. By

so doing they consented to suit by the native Hawaiian beneficiaries of the trust.

The Admissions Act specifically provides that the trust may be enforced by suit brought by the United States. Since the United States has not retained similar enforcement rights over the school land grants to other states, the purpose for this enforcement provision was only to protect the rights of the native Hawaiians as special beneficiaries under the trust. Because the United States has not seen fit to exercise this power, the native Hawaiians ought to be allowed to do so under the co-plaintiff doctrine rejected by the Court of Appeals in *Price v. State of Hawaii, supra*, 764 F.2d at 631.

If certiorari is granted Petitioners would argue that the private defendants were clearly acting under color of state law under the standard of *Lugar v. Edmondson Oil Co., Inc., supra*, quoted below by the Court of Appeals. App., p. 10-11. Petitioners' deprivation was caused by the exercise of a privilege created by the state; to wit, the right to continue to wrongfully receive the rents and profits from property belonging to the § 5(f) trust. The private parties were state actors because they obtained significant aid in their conduct from the state officials. Indeed, they would not have been able to continue in this wrongful conduct if the state officials had performed their duty to eject them from the property.

The Court of Appeals was clearly concerned about the *merits* of Petitioners' claim. This difficulty was caused by consideration of evidence that the district court did not rule on or even consider. The Court of Appeals was distracted by the fact that the specific transaction referred to in the complaint as revesting

title to the property in the State had been approved in advance by a state court.

This fact has nothing to do with the issue of state action or color of state law. If the facts alleged in the complaint are assumed to be true, as they must be on a motion to dismiss, the private parties are wrongfully receiving rents and profits belonging to the trust. If this wrongful conduct was approved and condoned by the state court, then state action is all the more clearly involved.

The fact that the judge who approved the transaction was later appointed to the state Supreme Court, and the deputy attorney general was later appointed to the Circuit Court bench, both appointments occurring at a time when the attorney for HSHS was president of the state senate, might be a mere coincidence.

Nevertheless, given an opportunity to obtain discovery, Petitioners are confident they can prove that a reversion has occurred at some time in the past and the property should rightfully belong to the § 5(f) trust corpus. Given that, the private parties are engaged in conduct under color of state law.

This Court should grant the writ, because the questions presented for review raise very important questions of federal law which have not been, but should be, settled by this Court. Rev. Rules of Sup. Ct., Rule 10.1(c). These questions seek to define the extent to which native Hawaiians may bring suit in federal court to enforce the trust established for their benefit by § 5(f) of the Hawaii Admissions Act. The first question involves the scope of that right as it pertains to the State of Hawaii. The second question involves the scope of that right with respect to private individuals who may be in wrongful possession of trust

assets.

These questions have been the topic of considerable public interest and debate, over the past several years. Indeed, the issue was the topic of a full page article titled "Broken Promise: How Everyone Got Hawaiians' Homelands Except Hawaiians", by Susan C. Faludi, Staff Reporter, in the September 9, 1991 issue of *The Wall Street Journal*. According to that article:

> "Politicians have teen telling native Hawaiians to hang on for 70 years, ever since Congress passed the Hawaiian Homes Commission Act in 1921, setting aside nearly 200,000 acres in scattered tracts across the islands. Congress hoped to save the dying Hawaiian people by returning a small portion of land taken from them in what even a U.S. president had called the unlawful federal seizure of Hawaii in 1893.
>
> "The federal act requires the state to lease modest residential, farm and pastoral homestead lots for $1 a year to any Hawaiian with at least 50% native ancestry. * * *
>
> "But many decades later, more than 60% of the land has been rented at bargain-basement prices to non-natives--many of them belonging to the richest and most powerful families in the islands--or swapped or simply given away to other government agencies. [One area], for example, has been leased for many years by Parker Ranch, the nations' second-largest private ranching business. The ranching corporation pays the state $3.32 an acre each year to use the property locking up 27,000 acres of homelands.
>
> * * *
>
> "Other land has gone to multinational corpo-

rations for quarrying and mining operations, to the U.S. military for the Pacific naval headquarters, to state agencies for waste-water treatment plants and airports and cemeteries, to mayors and legislators for their own private companies and personal estates, to prominent businessmen for auto dealerships and shopping strips and tourist attractions, and to shrewd investors who have turned around and subleased the property for as much as eight times their rent.

"Native Hawaiians, who are the poorest and most ill-housed population in the state, hold just 17.5% of the acreage. In the law's entire history, only 3,700 of the tens of thousands of families who have been eligible have actually been allowed to settle on the homelands. While about 5,800 families have been awarded land, the state bars more than a third of them from moving onto their land because it lacks basic infrastructure--which the state itself is supposed to build.

* * *

"Hawaii has a strong economy and huge cash reserves: State government boasted a $456.3 million surplus in fiscal 1991. But many of the 50,000 native Hawaiians currently eligible under the 1921 act haven't participated in the boom. According to a 1990 stat-sponsored study of the 200,000 people who are any part . . . Hawaiian, more than 2,000 of them live in cardboard boxes, rusted cars or on the beaches--and 40% of the homeless Hawaiians have been on the waiting list for a homestead for more than seven years. As the states housing crisis mounts, the number of native Hawaiians on the waiting list has ballooned,

> more than doubling in the past six years even though officials have at times purged the list of inactive names."

Ms. Faludi attributes the breach of trust by the state to a lack of a right of the beneficiaries to sue to enforce the trust:

> "Little has been done about the violations, however, in part because the act itself authorizes only the federal government, not native Hawaiians, to sue the state for breaking the homelands law. And the federal government has never taken legal action."

Perhaps as the result of Petitioners' limited success in litigation with the state respondents, they have recently recognized an urgent need to provide native Hawaiians with a right to sue to enforce the trust. Their solution to the problem, however, is not a right to sue them, but a right to sue the federal government. In January, 1991, the state respondents released a document entitled *An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Law Trust, Office of the Governor.*

This plan was put in perspective on December 12, 1991, when the Hawaii Advisory Committee to the U.S. Commission on Civil Rights issued its report entitled "A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians."

On August 2, 1990, Governor Waihee provided that Committee with his written statement which is quoted in the Report, as follows:

> "The State holds that the Federal Government shares with the State the role and burdens of trust responsibilities to the Hawaiian Home Lands beneficiaries in fulfilling the purposes of the Act. This is not a view that is held by the legal and fiscal agents of the United States, who are even now constructing arguments to the contrary. Any federal assistance for Hawaiian Home Lands has occurred only with the persistence of Congress. . . . Nevertheless part of the State's responsibility is to continue to press claims against federal agencies for past inequities, and to lobby for present and future resources." *Id.*, at 11.
>
> The Attorney General of the State has testified that "Congress should allow claims to be heard in federal court because of the trust breaches which occurred during territorial days," when the United States administered the HHCA (*An Action Plan to Address Controversies Under the Hawaiian Home Lands Trust and the Public Law Trust, Office of the Governor*, January 1991). *Id.*, p. 16, fn 42.

This effort on the part of the state respondents to blame the federal government for their own wrongdoing, is made obvious by the Report. The complaints by the state against the federal government are summarized as follows:

> "There is no more compelling evidence of the Federal Government's callous disregard for the rights of Native Hawaiians than the continuing occupation by the United States of valuable homelands, especially the use by the Navy of some 1,356 acres of land at Lualualei." *A Broken Trust*,

at 17.

"In addition to Lualualei, the Federal Government has breached its duty as a trustee by allowing other lands in the homestead inventory to be leased to the military and other Federal agencies. For example, the U.S. Army is currently occupying 295 acres of trust land at Pohakuloa, Hawaii, under a general lease that was executed in 1964 for 65 years at $1 for the entire term. The U.S. Navy is using 25 acres of trust land at Kekaha, Hawaii, as a military storage area, also under a lease for 65 years at $1 for the entire term. The Federal Aviation Administration utilizes 54 acres of trust land at Keaukaha, Hilo, Hawaii, for a radar and communications facility set aside by executive orders of the Governor of the Territory of Hawaii in 1948 that have previously been declared illegal. *Id.*, at 18-19.

Having received 1.4 million acres of land from the federal government for the betterment of the conditions of native Hawaiians, the state claims to be frustrated in their efforts to provide homesteads by the Navy's refusal to give them another 1400 acres. Petitioners can understand the frustration of Attorney General Warren Price, when he lost his attempt to recover the Lualualei land by suit against the Navy in federal court. (*State of Hawaii v. United States*, 676 F.Supp. 1024 (D.Haw. 1988), *aff'd*, 866 F.2d 313 (9th Cir. 1989.)

"Attorney General Price, in his congressional testimony, noted that 'our efforts to obtain . . . relief from the United States as to the Lualualei lands was met with technical arguments that the

> Government has immunity, and will give the lands back to the State of Hawaii when they are good and ready.'" *Id.*, at 18.

But had the effort been successful, native Hawaiians would not have been any better off. The state respondents would simply have had another 1400 acres to distribute as political patronage.

> "On Oahu, the most populous island with the greatest demand for homes, only 921 acres are homesteaded by Native Hawaiians. The remaining *5,609 acres are used for other purposes*, including nearly 1,400 acres by the U.S. Navy. *Id.*, at 23.

Thus, the 1,356 acres of homestead land occupied by the Navy is not the reason why native Hawaiians are living in cardboard boxes. There is plenty of land for homestead purposes. State officials merely choose to use it for other purposes.

Nevertheless, Hawaii's congressional delegation is working hard on behalf of the state respondents to enact a *federal* "right to sue" law for native Hawaiians. In August, 1989, extensive public hearings were conducted by the Senate Select Committee on Indian Affairs and the House Committee on Interior and Insular Affairs. A hearing is presently scheduled for February 6, 1992 before the Senate Committee on Energy and Natural Resources to review the status and recommendations of the 1983 Federal-State Task Force on the Hawaiian Homes Commission. Sen. Inouye's office is presently drafting a federal "right to sue" bill.

If such legislation is enacted, Petitioners fear the state respondents will argue that the statutory remedy precludes any remedy under § 1983 against them.

The problem of homeless native Hawaiians was sol-

ved in 1959 when Congress inserted § 5(f) into the Hawaii Admissions Act. Congress more than adequately provided for the welfare of the native Hawaiians. Congress was also more than generous to the State of Hawaii.

Nothing more is needed now than to enforce the law as it presently exists. For that purpose, this court should grant certiorari. Petitioners have been engaged in litigation with state respondents for nearly twelve years. Although Petitioners have met with limited success in asserting their right to sue under § 1983, state respondents have not yet answered a single set of interrogatories.

Once it is made clear to the state officials that they cannot continue to engage in dilatory tactics to avoid the merits of these cases, they will solve the problem. The resources available are vast and the needs of the native Hawaiian are small.

CONCLUSION

For the foregoing important reasons, Petitioners respectfully request this Court to issue a Writ of Certiorari to the Ninth Circuit Court of Appeals to review its opinion in *Price v. State of Hawaii*, C.A. Nos. 90-15117 and 90-15863, filed July 11, 1991, amended August 8, 1991, amended September 18, 1991, and published as *Price v. State of Hawaii*, 939 F.2d 702 (9th Cir. 1991).

Dated: Honolulu, Hawaii, January 28, 1992.

Respectfully submitted,

Walter R. Schoettle
(Counsel of Record)

Kamuela Price

APPENDIX

Nos. 90-15117, 90-15863.

D.C. No. CV-89-0561-HMF

United States Court of Appeals

for the Ninth Circuit

Dr. Nui Loa PRICE, aka Maui Loa, individually and in his capacity as chief of the Hou Hawaiians; The Hou Hawaiians, a Native Hawaiian Ohana; and Kamuela Price, individually, and In his capacity as member of the elder council of the Hou Hawaiians, Plaintiffs-Appellants,

v.

STATE OF HAWAII, William W. Paty, individually and as Chairman of the Board of Land and Natural Resources of the State of Hawaii; Herbert K. Apaka, Jr.; Moses W. Kealoha; J. Douglas Ing; John Arisumi; Herbert Arata, individually and as Members of the Board of Land and Natural Resources of the State of Hawaii; John Waihee, individually and as Governor of the State of Hawaii; The Honolulu Sailors Home Society, a Hawaii non-profit corporation; HFSL Corp., a Hawaii corporation, dba Harbor Associates; Peter S. Smith, dba Smith Development Corp.; Glenn K. Okada, dba G.K.O. Corp.; and HonFed Bank, a federal savings bank, Defendants-Appellees.

Appeal from the United States District Court
for the District of Hawaii.
Harold M. Fong, Chief Judge, Presiding

Argued and Submitted
June 11, 1991--San Francisco, California

Filed July 11, 1991

Amended September 18, 1991

Before Robert R. Beezer, John T. Noonan, Jr. and Ferdinand F. Fernandez, Circuit Judges.

FERNANDEZ, Circuit Judge:

Once again we visit the scene of the ongoing contest which pits Dr. Nui Loa Price, Kamuela Price and the Hou Hawaiians (appellants) against the State of Hawaii (the State) and a number of its officials. [1] This visit we find a pitched battle into which a number of private parties have also been drawn. Those parties are the Honolulu Sailors Home Society (HSHS), HFSL Corporation, dba Harbor Associates, Peter S. Smith, dba Smith Development Corp., Glenn K. Okada, dba G.K.O. Corporation, and HonFed Bank. We will sometimes refer to all of this group as the "private appellees." Appellants claim that a certain parcel of land in which the private appellees purportedly have an interest is, in fact, owned by the State and is subject to the public trust which was created at the time that the State was admitted to the Union. Based upon the facts pled and otherwise before us in this action, we disagree and we affirm the district court's dismissal of the action as to all defendants other than the state officials.

PROCEDURAL POSTURE AND BACKGROUND FACTS

In 1893 the Provisional Government the Hawaiian Islands granted a parcel of land to HSHS (the lot). The

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1. Those officials are: William W. Paty, Herbert K. Apaka, Jr., Moses K. Kealoha, J. Douglas Ing, John Arisumi, Herbert Arata and John Waihee. They are hereafter referred to as "the state officials."

grant provided that the lot "shall be used only for the purposes and uses of a Sailors Home . . . equally available to the sailors of all nations. . . ." It went on to provide that if the "described lot or any part thereof shall at any time cease to be used for the purposes of a Sailors Home, the whole of said lot shall forthwith revert to the Government of the Hawaiian Islands."

HSHS took possession of the lot and commenced using it for a sailors home. Unfortunately, as is so often true when perpetual restrictions are imposed upon the uses of land, changes in the uses of surrounding properties made the restriction outdated, onerous and lacking in economic sense. The lot is in the heart of Honolulu's downtown business district.

HSHS, however, did not simply violate the restrictions and abide the consequences. Rather, it commenced legal proceedings in which it asked the courts of Hawaii to approve certain plans in advance. Those plans would, in the opinion of HSHS, make use of the lot in a way that carried out the intent of the grantor, even though the uses may not, at first blush, have appeared to have been within the specific terms of the grant itself. HSHS resorted to the courts on three separate occasions, but only the last resort is the subject of this case.

In 1969, HSHS filed an action in which the State was made a party. The Attorney General of the State appeared and represented its interests. At that time, the Circuit Court of the First Judicial Circuit of the State of Hawaii determined that the lot itself was not going to be the physical location of a sailors home, but that its use in combination with other adjacent property would "constitute an actual physical use of a substantial portion of the premises for sailors." Moreover, said the court, this would be a "fair, just and reason-

able" arrangement. See Findings of Fact and Conclusions of Law in *In re the Honolulu Sailors' Home Society*, CV No. 28078 (July 14, 1969). *See also* the judgment of even of date. In other words, the court placed its imprimatur upon the contemplated transaction.

Appellants were not pleased with the fact that, in effect, no sailors' home was actually to be located on the lot itself. Thus, in 1989, appellants commenced this action for the purpose of having the private appellees ejected from the lot and of having the State commence receiving any income which the lot then produced. The reason that what appears to be a local dispute over property rights is before the federal courts is to be found in section 5(f) of the Hawaii Admissions Act. Pub.L. 86-3, § 5(f), 73 Stat. 4 (1959) (the Act). As pertinent here, section 5(f) reads as follows, and we have emphasized the part most pertinent to our discussion:

> The *lands* . . . together with the proceeds from the sale or other disposition of any such *lands* and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians . . ., for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. *Such lands, proceeds and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said state may provide and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.*

Appellants assert that since the rights of the Provisional Government in the lot passed to the United States and thence to the State upon its admission to the Union, those rights are subject to the provisions of section 5(f) of the Act. That being so, say the appellants, the State through the inaction of its officials has allowed an improper diversion of revenues that should have come into the State's hands and been used for section 5(f) purposes.

This is not the first time that appellants have accused the State and its officials of violating the trust imposed upon the land which was ceded to the State under the terms of the Act. *See Price v. Akaka*, 928 F.2d 824 (9th Cir.1991) (superseding 915 F.2d 469 (9th Cir. 1990)) (*Akaka*); *Price v. State of Hawaii*, 921 F.2d 950 (9th Cir. 1990) (*Price II*); *Price v State of Hawaii*, 764 F.2d 623 (9th Cir.1985), *cert. denied*, 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986) (*Price I*). In each of those cases, as well as others hereinafter noted, we were required to explore the interface between state and federal law which was created upon the passage of the Act. We must now do so again, although, as will appear, many of the issues before us have already been decided in our prior visitations to this area.

JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. § 1343 and 42 U.S.C. 1983. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the grant of summary judgment and the grant of a motion to dismiss de novo. *Price II*, 921 F.2d at 954. Issues of eleventh amendment and qualified immunity are also reviewed de novo. *Id.* Questions of

immunity which arise from facts not in dispute also present issues of law. *Id.*

We review the district court's award of fees under Rule 11 for an abuse of discretion. *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1365-66 (9th Cir. 1991) (en banc) (superseding 914 F.2d 1136, 1143 (9th Cir. 1990) (en banc)). Attorneys fees awards under 42 U.S.C. § 1988 are also reviewed for abuse of discretion. *Barry v. Fowler*, 902 F.2d 770, 773 (9th Cir. 1990).

DISCUSSION

A. Standing.

At the outset, we are met by the State's assertion that appellants lack standing. This issue can be quickly disposed of. We have previously made it clear that persons in the position of these appellants do have standing to challenge the use of section 5(f) lands. *See Akaka*, 928 F.2d at 826-27; *Ulaleo v. Paty*, 902 F.2d 1395, 1397 (9th Cir.1990); *Price I*, 764 F.2d at 630. As we have said, although section 5(f) itself does not provide a private right of action, an action under 42 U.S.C. § 1983 is proper. *Ulaleo*, 902 F.2d at 1397; *Keaukaha-Panaewa Community Ass'n v Hawaiian Homes Comm'n.*, 739 F.2d 1467, I470-71 (9th Cir.1984) (*Keaukaha II*).

B. Immunity; Dismissal of the State and the State Officials.

(1) The State.

Appellants have, once again, attempted to sue the State. As we said in *Price II*, 921 F.2d at 958: "It is pellucid that they cannot, for the eleventh amendment prohibits it." Thus, the district court properly dismissed the action against the State itself.

(2) State Officers in their Official Capacity.

The complaint seeks retrospective relief against the state officials. It seeks no prospective relief against them. To the extent that it is intended to be an action against them in their official capacities, it is likewise barred by the eleventh amendment, and the district court's dismissal was proper. *See Ulaleo*, 902 F.2d at 1398-1400.

(3) State Officers in their Individual Capacities.

There can be little doubt that appellants could bring their action under section 1983 against the state officials in their individual capacities, even if those officials were performing their governmental duties when they committed the alleged wrongs. *Akaka*, 928 F.2d at 828. The district court's determination to the contrary was in error.

However, the State officials argue that the facts which appear on this record make it clear that they are entitled to qualified immunity. There can be no doubt that their activities or lack of activities regarding the lot in question were discretionary functions. As we said in *Price II*, 921 F.2d at 958: "[O]fficials performing discretionary functions, as were these officials, are entitled to qualified immunity if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)." However, the issue was not raised in the motion before the district court, although it was raised in the state officials' answer.

We recognize that in order to avoid a qualified immunity claim the appellants must show that the law supporting the following chain of reasoning was clearly

established, *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738: that the State's interest was an interest in land,[2] that the land reverted to the State when the 1969 transaction was consummated,[3] and that the failure to collect revenues from the land since that time resulted in a violation of section 5(f) of the Act,[4] all of which leads to liability of the state officials under section 1983.

While we have serious doubts that the plaintiffs can overcome the difficulties involved in showing that, objectively speaking, the officials violated clearly established legal principles, immunity is an issue that should first be addressed by the trial court. *See*, *id.* at

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2. Whether the right held by the State is an interest in land within the meaning of section 5(f) of the Act, rather than mere "public property" referred to in section 5(b) is a matter subject to debate, although our recent decision in *Napeahi v. Paty*, 921 F.2d 897 (9th Cir.1990) strongly suggests that it is the former.

3. Whether the grant in question is, under the law of Hawaii, a fee simple determinable or a fee simple subject to a condition subsequent is not, as far as we have been able to ascertain, entirely clear. Compare Restatement of Property § 23 (1936) with Restatement of Property § 24 (1936). If the former, the property would revert automatically; if the latter, the State would have to take action to enforce the condition and recover the property. See Restatement of Property, Introductory Note to Chapter 4 (1936).

4. Anyone who reviewed the situation would immediately discover that the 1969 transaction was expressly approved by the circuit court when it issued its decree on July 14, 1969. As we have already pointed out that was a proceeding to which the state was a party. The proposition that the law clearly required state officials to attempt to oust HSHS and the other private appellees from the lot in the face of that state court decree is problematic to say the least.

819-20, 102 S.Ct. at 2739.[5]

C. *Color of State Law; Dismissal of the Private Appellees.*

Appellants joined HSHS and the other private appellees in this section 1983 action,[6] but the complaint alleged no facts to support the claim that the private appellees were acting under color of state law. On the contrary, the allegations of the complaint make it clear that HSHS is the owner in fee simple of the lot, subject to the use limitations and reversionary interest of the State which we have already described. Nothing in the complaint suggests that the private appellees have done anything that any other holder of fee title to land would not have done, except, of course, the seeking of court approval before taking actions that might have possibly caused divestment of the property. None of this contains a whisper of a suggestion that these appellees have acted with the State in any sense whatever.

We recognize that this case was dismissed at the pleading stage pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. We also recognize that there is great liberality in federal pleading. *Conley v. Gibson*, 355 U.S. 41, 47-48, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957); *Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045, 1050 (9th Cir.1974). However, private parties are not generally acting under color of state

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5. For the same reason, we decline to consider the state officials' claim that the action is barred by the statute of limitations.

6. Of course, appellants have no direct cause of action under section 5(f). Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n., 588 F.2d 1216, 1220-24 (9th Cir.1978), cert. denied, 444 U.S. 826, 100 S.Ct. 49, 62 L.Ed.2d 33 (1979).

law, and we have stated that "'[c]onclusionary allegations, unsupported by facts, [will be] rejected as insufficient to state a claim under the Civil Rights Act.'" *Jones v. Community Redevelopment Agency*, 733 F.2d 646, 649 (9th Cir. 1984) (citation omitted). This is appropriate for, as the Supreme Court has said:

> Careful adherence to the "state action" requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power. It also avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed. A major consequence is to require the courts to respect the limits of their own power as directed against state governments and private interests.

Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 936-37, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982).

Of course, the determination is usually "fact bound", and that militates against too hasty a termination of an action. *Id* at 939, 102 S.Ct. at 2755. Nevertheless, a defendant is entitled to more than the bald legal conclusion that there was action under color of state law. The Supreme Court has "insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the State." *Id.* at 937, 102 S.Ct. at 2753. In deciding whether action is attributable to the State, a two-part test is applied:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible.... Second, the party charged with the deprivation must be a person who may fairly be said to be a state

> actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.

Id at 937, 102 S.Ct. at 2753-54.

Appellants suggest nothing which indicates that the actions of the private appellees were in any way imposed by the State or that they exercised some right granted by the State, except to the extent that they sought state court approval of their 1969 plan before going ahead with it. But appellants do not allege that seeking court approval constituted state action, and, of course, "merely resorting to the courts . .. does not make a party a co-conspirator or a joint actor with the judge." *Dennis v. Sparks*, 449 U.S. 24, 28, 101 S.Ct. 183, 186, 66 L.Ed.2d 185 (1980).[7]

A person may become a state actor by conspiring with a state official, *id*, or by engaging in joint activity with state officials, *Sable Communications v. Pacific Tel. & Tel. Co.*, 890 F.2d 184, 189 (9th Cir.1989) (de-

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[7] *Shelly v. Kraemer*, 334 US. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948), is not to the contrary. There the state courts were used to enforce an egregious form of racial segregation, and the wrong was uniquely aggravated by court action. *Cf. Edmonson v. Leesville Concrete Co., Inc.*, – U.S. –, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991), where the Court held that racially based peremptory challenges in civil cases involved the court system in malignant discrimination in the courtroom itself, Here, however, the state court was dealing with a relatively simple real property and trust issue which had no facinorous overtones whatever. At any rate, if the seeking of state court approval were the wrong in question, that occurred in 1969 and the statute of limitations has long since run. Haw.Rev.L. § 657-7. *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989).

fendant sought the aid of law enforcement officials in order to use further procedures that would violate the plaintiff's first amendment rights). A person may also become a state actor by becoming so closely related to the State that the person's actions can be said to be those of the State itself. That might be found because the nexus is so close as to cause the relationship to be symbiotic. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725, 81 S.Ct. 856, 862, 6 L.Ed.2d 45 (1961); *Vincent v. Trend Western* Technical Corp., *828 F.2d* 563, 569 (9th Cir.1987). It might also be for such other reasons as performing public functions or being regulated to the point that the conduct in question is practically compelled by the State. *Vincent*, 828 F.2d at 568-69.

None of these forms of connection between the State and the private appellees is pled here, nor are any of them hinted at. On the contrary, HSHS received a grant of property and has treated that property as its own for almost one hundred years. In other words, since there was no sufficient pleading that the private appellees were acting under color of state law, the district court properly dismissed the action as to them. [8]

D. Award of Attorneys Fees to HSHS.

(l) District Court Award.

The district court awarded fees against appellants and their counsel and in favor of HSHS. It did so based upon Fed. R.Civ.P. 11, and 42 U.S.C. § 1988.

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8. Appellants, in passing seem to suggest that pendent party jurisdiction would allow them to hold HSHS and the other private defendants in this action. Pendent party jurisdiction is not available. *See Finley v. United States*, 490 US. 545, 109 S.Ct. 2003; 104 L.Ed.2d 593 (1989). *See also Aldinger v. Howard*, 427 US. 1, 96 S.Ct. 2413, 49 LEd.2d 276 (1976).

In making that award, the district court found that there was simply no factual basis for the claim that HSHS was acting under color of state law. The court was also impressed with the fact that HSHS had repeatedly asked for a dismissal without prejudice, and had made appellant aware of the legal and factual positions of HSHS. In addition, it appeared that the parties had orally agreed upon a dismissal without prejudice, but that appellants' counsel refused to sign a written agreement. Moreover, appellants, and their counsel failed to appear to contest the requested fee award.

The district court thus determined that the action was "frivolous, groundless and unreasonable." Before an award of fees against the plaintiff may be made under section 1988, the action must be meritless and without foundation. *Hughes v Rowe*, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 LEd.2d 163 (1980). That is precisely what the district court found here.

Rule 11 provides a different standard. Under Rule 11 an award is required if a paper which is frivolous is filed. *See Townsend v. Holman Consulting Corp.*, 929 F.2d at 1362. Here the district court found that the filing of the complaint against HSHS was, indeed, frivolous. We recognize that the state action concept can be murky at its depths, [9] but when one is as close to its surface as we are in this case the concept has much greater clarity. Here, because the complaint so patently failed to state a claim against HSHS under section 1983 and because appellants and their counsel eschewed the opportunity to appear before the district court and disabuse it of its idea that the claim was entirely baseless, we are

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9. *See Edmonson v. Leeville Concrete Co. Inc.*, __ US. __, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991).

unable to say that the court abused its discretion when it awarded fees grounded upon both section 1988 and Rule 11. We, therefore, affirm its decision regarding fees.

(2) Fees on Appeal.

We, too, have the discretion to award fees on appeal when the appeal itself is frivolous. See 42 U.S.C. § 1988. Particularly in light of the district court's decision, we have given close attention to the request here, and to the arguments, some of them new, which appellants have suggested to us.

While we have not adopted appellants' arguments regarding the private appellees, we are not convinced that the appeal itself is frivolous. Beyond that, we have been subjected to arguments by the appellees in this case--arguments adopted by HSHS and the other private appellees--on issues which, themselves, have previously been settled by us. See, for example, Part A of this Opinion regarding standing. Appellees have even suggested that there is no section 1983 action available regarding failure to follow section 5(f) of the Act. Again, the contrary has long since been settled by us. *See Price II*, 921 F.2d at 956; *Akaka*, 928 F.2d at 827-28; *Ulaleo*, 902 F.2d at 1397; *Keaukaha II*, 739 F.2d at 1470-71.

Accordingly, we will not exercise our discretion to award attorneys fees to any of the parties in this case. [10]

CONCLUSION

Appellants have once again presented claims that

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10. This is not antithetical to our determination regarding the district court's award of fees. We must exercise our own discretion when fees are requested on appeal. We deferentially review the district court's exercise of discretion when it awards fees. The standards are different. So may be the results.

the State of Hawaii and its officials have failed to carry out their solemn duties under the Hawaii Admissions Act. Their claims against the State have spent themselves upon a revetment built of immunity principles. Their claims against the private appellees have fallen far short of meeting the requirement that those parties must have acted under color of state law. However, they may continue to pursue their damage claims against the state officials at this time.

We have previously said that these appellants can call the responsible parties to account when section 5(f) of the Act is violated. *Price II*, 921 F.2d at 959. However, in order to do so appellants must, like everyone else, bring the right claims against the right individuals. Here the combination of a failure to seek prospective relief against the state officials and a temerarious attack on private individuals, who were merely using land which had been deeded to them, has brought the greater part of appellants' action to nought. The success or failure of the remainder awaits the skirmishes of another day.

AFFIRMED IN PART and REVERSED IN PART.

Nos. 90-15117, 90-15863.

United States Court of Appeals

for the Ninth Circuit

Dr. Nui Loa PRICE, *et al.*

Plaintiff-Appellants,

v.

STATE OF HAWAII, *et al.*

Defendants-Appellees.

Filed September 18, 1991

ORDER

Before: BEEZER, NOONAN and FERNANDEZ, Circuit Judges.

The amended opinion filed in this case on August 8, 1991, is further amended as follows: at page 10672 of the slip opinion the first paragraph under Part D (1) is amended to read as follows:

> The district court awarded HSHS fees against appellants and their counsel, Walter R. Schoettle. It did so based upon Fed.R.Civ.P. 11, and 42 U.S.C. § 1988.

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D.C. No. CV-89-0561-HMF

United States District Court

for the District of Hawaii

Dr. Nui Loa PRICE, aka Maui Loa, individually and in his capacity as chief of the Hou Hawaiians; The Hou Hawaiians, a Native Hawaiian Ohana; and Kamuela Price, individually, and In his capacity as member of the elder council of the Hou Hawaiians, Plaintiffs-Appellants,

v.

STATE OF HAWAII, William W. Paty, individually and as Chairman of the Board of Land and Natural Resources of the State of Hawaii; Herbert K. Apaka, Jr.; Moses W. Kealoha; J. Douglas Ing; John Arisumi; Herbert Arata, individually and as Members of the Board of Land and Natural Resources of the State of Hawaii; John Waihee, individually and as Governor of the State of Hawaii; The Honolulu Sailors Home Society, a Hawaii non-profit corporation; HFSL Corp., a Hawaii corporation, dba Harbor Associates; Peter S. Smith, dba Smith Development Corp.; Glenn K. Okada, dba G.K.O. Corp.; and HonFed Bank, a federal savings bank, Defendants-Appellees.

Filed December 07, 1989
at 10 o'clock and 10 min. a.m.

ORDER GRANTING STATE DEFENDANTS' MOTION TO DISMISS AND PRIVATE DEFENDANTS' MOTION TO DISMISS COMPLAINT AND ACTION

INTRODUCTION

Two motions to dismiss Plaintiffs' complaint or, in the alternative, for summary judgment appear before the court. One is brought by the state defendants, the State of Hawaii, William Paty, Herbert K. Apaka, Jr., Moses W. Kealoha, J. Douglas Ing, John Arisumi, Herbert Arata and Governor John Waihee. The state defendants primarily assert sovereign immunity from this suit under the Eleventh Amendment. The other motion is brought by the private defendants, Honolulu Sailors' Home Society, HFSL Corp., Peter S. Smith, Glenn K. Okada, and HonFed Bank. Their motion primarily argues that the complaint fails to state a § 1983 claim against them as private individuals. Plaintiffs oppose both motions.

These motions for dismissal or summary judgment came on for hearing before this court on December 4, 1989. Walter R. Schoettle appeared on behalf of plaintiffs. Randall Y.K. Young and Charlotte E. Libman appeared on behalf of the State of Hawaii and the other state defendants, Keith J. Steiner appeared on behalf of the defendant Honolulu Sailors' Home Society, Lissa H. Andrews appeared on behalf of defendant HonFed Bank, and Glenn H. Kobayashi appeared on behalf of defendants HFSL Corp., Peter S. Smith, and Glenn K. Okada. The court, having reviewed the motion and the memoranda in support thereof and in opposition thereto, having heard the oral arguments of counsel, and being fully advised as to the premises herein, finds as follows:

Plaintiffs bring this claim for monetary, injunctive and declaratory relief under 42 U.S.C. § 1983 (1982) as Native Hawaiian special beneficiaries of a trust imposed by § 5(f) of the Hawaii Admissions Act upon certain

lands granted by the United States to the State of Hawaii by § 5(b) of that Act. The complaint alleges that on March 21, 1893, the provisional Government of the Hawaiian Islands executed and delivered a deed for a certain parcel of land to defendant Honolulu Sailors' Home Society (hereinafter "HSHS") for use as a sailors' home upon the condition that "if the herein described lot or any part thereof shall at any time cease to be used for the purposes of a Sailors' Home, the whole of said lot shall forthwith revert to the Government of the Hawaiian Islands." In 1898 the United States annexed the Hawaiian Islands. As part of the Joint Resolution of Annexation, the United States allegedly acquired the Hawaiian government's reversionary interest in the subject property. On August 21, 1959, the United States admitted Hawaii as its fiftieth state through the Hawaii Admissions Act. P.L. No. 86-3, 73 Stat. 4 (1959). Section 5(b) of that Act granted the reversionary interest to the new State of Hawaii. Under § 5(f), the lands conveyed to the State of Hawaii under § 5(b) shall be held by the State as a public trust to be used in any of five enumerated purposes, including "for the betterment of the conditions of native Hawaiians." The State delegated the responsibility as trustee to its Bureau of Land and Natural Resources.

On October 3, 1969, HSHS entered into a lease demising a portion of the subject property together with other properties to Harbor Properties for the purpose of developing the properties as a residential and commercial leasehold condominium, the Harbor Square Condominium. The Harbor Square Condominium consists of two towers, the Harbor Tower (which is on the subject property) and the Town Tower (which is not). The Harbor Square Condominium continues to house

a Sailors' Home Apartment consisting of 3650 square feet on the first floor and 4515 square feet on the second through fourth floors which shall be occupied and used for all purposes permitted by the HSHS charter. Since the Sailors' Home Apartment falls exclusively within the Town Tower, which is not on the subject property, Plaintiffs assert that no part of the subject land is now used as a sailors' home, thus violating the conditions of the 1893 grant. As such, Plaintiffs contend that the land reverted back to the grantor government of the Hawaiian Islands and that the State of Hawaii as trustee of the § 5(f) trust has succeeded to the interests of the provisional government through the Joint Resolution of Annexation and the Admissions Act.

Plaintiffs allege that since October 3, 1969, HSHS and the developers (private defendants) have wrongfully received rents, issues, and profits from the subject property and that such monies rightfully belong to the beneficiaries of the § 5(f) trust. They also allege that by virtue of the § 5(f) trust, the state defendants as trustees owed a duty to plaintiffs to recover possession of the subject property and the moneys wrongfully lost. Finally, Plaintiffs assert that the defendants, acting under the color of state law, have deprived plaintiffs of the rights guaranteed them by § 5(f) and that if the state defendants are permitted to continue as unsupervised trustees of the subject properties, the beneficiaries will suffer irreparable loss and injury.

Plaintiffs pray for numerous forms of relief. First, they ask that private defendants HSHS, HFSL Corp., Smith, Okada, and HonFed be required to set forth the nature of their claims to the subject property. Second, plaintiffs seek a declaration regarding the nature of those private defendants' claims to the subject prop-

erty. Third, plaintiffs seek declaratory judgment that the trustee State of Hawaii owns the subject property in fee simple in trust for the benefit of plaintiffs and other beneficiaries under § 5(f) of the Admissions Act. They ask the court to find a reversion of the estate created by the 1893 grant upon the interruption of use as a sailors' home and to find that the private defendants have no legal interest in the property. Fourth, they ask the court to permanently enjoin the private defendants from asserting any claim in or to said property adverse to the trust. Fifth, plaintiff seek a monetary judgment against all defendants, jointly and severally, in the amount of all rents, issues, and profits wrongfully received from the subject property by defendant HSHS and the other private defendants since the date of the lease, together with interest thereon. Sixth, plaintiffs ask the court to appoint plaintiff Doctor Nui Loa Price, or some other suitable person having sympathy for native Hawaiians' concerns, as co-trustee with respect to the property recovered herein on behalf of the trust estate. Seventh, in the event their § 1983 claim succeeds, they seek payment of their attorney's fees as a prevailing party pursuant to 42 U.S.C § 1988. Finally, they ask for such other relief as may be just and proper.

DISCUSSION

I. State Defendants' Motion to dismiss or for summary judgment.

The state defendants, who include the State of Hawaii, state officials in their official capacity and state officials in their individual capacity, move the court to dismiss plaintiffs' complaint or, in the alternative, to grant summary judgment in their favor. They

assert sovereign immunity from this suit, challenge plaintiffs' standing to pursue this action, question the existence of § 1983 claim to enforce § 5(f) of the Admissions Act, and contend that plaintiffs have otherwise failed to state a claim upon which relief can be granted under § 1983.

A. Sovereign Immunity and jurisdiction.

The state defendants assert that this court has no jurisdiction to resolve the claims against them because of their sovereign immunity as guaranteed by the Eleventh Amendment to the Constitution. Thus, they move for dismissal of the complaint under Federal Rules of Civil Procedure Rule 12(b)(1). For the purposes of clearer analysis, the state defendants divide into three categories: the State of Hawaii, state officials in their official capacity, and state officials in their individual capacity.

1. Claims Against the State of Hawaii.

The State of Hawaii correctly argues that it has not waived its sovereign immunity, and thus this suit is barred by the Eleventh Amendment regardless of the relief sought. *Papasan v. Allain*, 478 U.S. 265, 276, 106 S.Ct. 2932, 2939 (1986). Although they disagree with the rulings, Plaintiffs concede that the prior rulings of this court and other courts in litigation involving native Hawaiians compels dismissal of the complaint against the State of Hawaii. A court will only find that a state has waived its sovereign immunity where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Price v. State of Hawaii*, 764 F.2D 623, 629 (9th Cir. 1985) (hereinafter "*Price I*"), *quoting Edelman v. Jordan*, 415 U.S. 651,

673 (1974).

Although the Hawaii Admission Act authorizes the United States to sue the State that act does not remove the State's sovereign immunity from suit by the Hou Hawaiians and their representatives. *Id.* at 629. The State has also waived part of its sovereign immunity and has consented to suit for certain contract and tort claims. Haw. Rev. Stat. §§ 661-1, 662-2. The State, however, consented to suit only in state courts and not to suit in federal court. In a 1981 case, *In re Holoholo*, 512 F.Supp. 889 (D.Haw. 1981), this court held that these statutes waived the State's sovereign immunity from suit in federal court and asserted jurisdiction over the State. In 1984, however, the Hawaii legislature amended the statute with the express purpose to "declare the intent of the legislature in amending section 661-1 and 662-3 . . . to extend jurisdiction to district courts in tort actions on claims against the State and certain other claims against the State, was originally and is not to extend jurisdiction for such actions and claims against the State to state district courts, and *not to extend jurisdiction for such actions and claims to federal district courts.*" 1984 Sess. Laws of Hawaii, Act 135 at 258 (emphasis added). The legislature went on to state that "[t]his Act is a response to the court's erroneous interpretation of section 662-3, Hawaii Revised Statutes, in *In re Holoholo.*" *Id.* Therefore, these §§ 661-1 and 662-3 cannot be read as a consent to suit in federal court, and all claims against the State of Hawaii must be dismissed for lack of jurisdiction, including those for monetary, injunctive, and declaratory relief.

2. Claims Against State Officials in their Official

Capacity.

Against the state officials acting in their official capacity, plaintiffs seek monetary damages for rents, issues, and profits, and for attorney's fees. Oddly, plaintiffs' complaint does not seek injunctive relief or declaratory relief against the state officials in their official capacities.

The Eleventh Amendment immunizes state officials acting in their official capacity from suits for retroactive monetary relief in federal court. *Price I*, 764 F.2d at 6298, *citing Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 909 (1984). Even more, the United States Supreme Court has held that neither States nor state officials in their official capacities are "persons" who may be sued under § 1983. *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304 (1989). The Eleventh Amendment immunity extends to state officials because any judgment against a state official in that capacity will ultimately be paid by the state. Allowing suits for monetary relief against state officials in the face of this reality would undermine the Eleventh Amendment immunity and render it meaningless.

A plaintiff, however, may sue a state official in his official capacity for prospective relief, such as an injunction, that governs the state official's future conduct. *Price I*, 764 F.2d at 629; *Pennhurst*, 465 U.S. 89, 102-03; 104 S.Ct. 900, 909 (1984). This legal principal cannot preserve plaintiffs' complaint as it pertains to the claims against the state officials because plaintiffs have failed to seek injunctive or other prospective relief against the state officials in their official capacities. Plaintiffs seek injunctive relief only against the private defendants to prevent them from asserting any claim to the subject property.

The request for the court to appoint a native Hawaiian to serve as co-trustee, although prospective, is not sought against state officials. Since the State itself is the sole trustee of the § 5(f) trust, that request must be perceived as an action against the State only.

Similarly, plaintiffs' complaint does not seek a declaratory judgment against the state officials in their official capacity. Plaintiffs seek a declaration regarding the nature of the private defendants' interests in the subject property, a declaration that the State of Hawaii owns the legal title to the subject property in fee simple and that the private defendants have no legal interest. Therefore, the plaintiffs have not overcome the sovereign immunity of officials in their official capacity by seeking declaratory relief.

Even if plaintiffs had sought declaratory relief against state officials in their official capacity, it appears that the suit would still be barred by the Eleventh Amendment since the declaratory relief would be primarily retroactive in nature. Declaratory relief that is directed at a past violation of federal law implicates the Eleventh Amendment if it would act like a money judgment. *Green v. Mansour*, 106 S.Ct. 423, 428 (1985). The court must look beyond the labels attached by the plaintiff and must determine whether the declaration sought is primarily retrospective in nature.

In *Papasan v. Allain*, 106 S.Ct. 2932 (1986), the State's sovereign immunity barred suit seeking replacement of lost trust corpus because such relief would, in effect, award accrued monetary liability. School students and officials sued the State of Mississippi for breach of trust obligations by selling lands granted to the State for the use of schools. The Court rejected the argument that the sale of the land represented a contin-

uing violation of federal law and held that ordering the State to replace the trust corpus, even though nominally injunctive and prospective, would have the same effect as monetary retrospective relief.

The instant case differs markedly from *Papasan*, but many aspects of the declaratory relief sought by plaintiffs are retrospective in nature. Plaintiffs here more successfully assert a continuing violation of federal law. Assuming plaintiffs allegations to be true, the State has failed to exercise its power of entry to terminate the determinable estate or has failed to take possession after reversion. Since a grantor may do so at any time within the limitations period, the State continually fails to assert the rights of the trust. The request for declaratory relief is largely retrospective in nature, however, because it seeks to establish a basis upon which to recover monetary relief.

3. Claims Against State Officials in their Individual Capacity.

Plaintiffs assert claims for monetary relief against state officials in their individual capacities. State officials sued in their individual capacities enjoy no Eleventh Amendment immunity because they are not cloaked with the sovereignty of the state. As such, the complaint against them in tat capacity cannot be dismissed for a lack of jurisdiction.

The complaint nevertheless fails to state a § 1983 claim against the state officials in their individual capacities. The court must look beyond the labels attached to the defendants and must consider whether they actually face suit for actions taken outside their official capacity. In two earlier cases involving the same plaintiffs, this court has dismissed claims against

state officials in their individual capacities because the complaint totally failed to allege acts taken in an individual capacity. In *Price v. Ariyoshi*, Civil No. 85-1189 (D.Haw. February 23, 1987) (Fong, J.), the court dismissed a complaint against state officials in their individual capacities for failure to state a claim because a review of the complaint indicated that its allegations were directed exclusively toward the defendants in their official capacities. No allegation focused on any acts or omissions in their individual capacities. *Id.* at 8-9. Likewise in *Price, et al. v. Akaka, et al.*, Civil No. 88-773 (D.Haw. January 11, 1989) (Ezra, J.), the court dismissed a complaint against state officials that sought to avoid sovereign immunity by suing them in their individual capacities. The court's review of the complaint revealed that the only reference to a suit against defendants in their official (*sic*) capacities was plaintiffs' prayer for "judgment against Defendants jointly and severally." *Id.* at 11. Since all other allegations refer only to acts performed in the defendants' official capacity, the complaint failed to state a claim against the state defendants in their individual capacities.

The complaint in the case now before the court similarly fails to allege any acts or omissions taken in the state defendants' individual capacities beyond simply naming them as defendants and seeking joint and several liability. Plaintiffs only challenge acts and omissions taken by the defendants in their administration of the § 5(f) trust fund. They performed those acts and made those omissions within their capacity as state officers. Therefore, the complaint fails to state a claim upon which relief can be granted to plaintiffs against state defendants in their individual capacities.

The court must dismiss the complaint. Fed.R.Civ.P. Rule 12(b)(6).

B. Existence of § 1983 Claim to Enforce § 5(f).

Defendants argue that § 5(f) creates no right in the trust beneficiaries that is enforceable under § 1983. Section 5(f) of the Admissions Act creates no independent right of action; the United States may sue to enforce the trust, but individual Hawaiians, including native Hawaiians made beneficiaries under the trust, have no private cause of action. *Price I*, 764 F.2d at 631; *see Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm.*, 588 F.2d 1216 (9th Cir. 1978), *cert.denied*, 444 U.S. 826 (1979) (hereinafter "*Keaukaha I*").

Despite this limitation on § 5(f), that section of the Admissions Act does create a federal "right" enforceable under 42 U.S.C. § 1983. *Price I*, 764 F.2d at 628, citing *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm.*, 739 F.2d 1467 (9th Cir. 1984) (hereinafter "*Keaukaha II*"). Section 5(f)'s trust obligation is rooted in federal law, and the power to enforce that obligation is contained in federal law. Thus, precedent of the Court of Appeals for the Ninth Circuit clearly recognizes this cause of action.

II. PRIVATE DEFENDANTS' MOTION

The private defendants, Honolulu Sailors' Home Society, HFSL Corp., Peter S. Smith, Glenn K. Okada, and Honfed Bank, also bring a motion to dismiss the § 1983 complaint against them or, in the alternative, for summary judgment. They argue that the complaint fails to state a § 1983 claim against them as non-state actors. Lacking that federal claim, they

argue that this court has no subject matter jurisdiction over them. Because the private defendants' arguments are correct, the claims against them must be dismissed.

A. Failure to State § 1983 Claim Against Non-State Actors.

Private persons and organizations are not generally acting under "color of law" and hence, are not ordinarily subject to § 1983 actions. Although the legal landscape is not well-settled, it appears that a private person or organization will be deemed to have acted under color of law when it conspires with a public official or acts in concert with such an official to deprive a plaintiff of his or her constitutional or statutory rights. As such, a private individual or entity has to assume some sort of agency relationship with the state to act under the color of state law required to impose liability under § 1983.

Plaintiffs have clearly failed to plead facts that would assert a § 1983 claim against the private defendants. The complaint merely alleges that the private defendants have attempted to acquire some kind of interest in the subject property. They have either acquired rights to develop the land or have secured a loan by perfecting a mortgage in the subject property as collateral. These acts do not rise to the level of conspiracy with public officials. They represent completely private acts not taken under color of state law.

B. Lack of Subject-Matter Jurisdiction over Other Claims.

Once the § 1983 claim against the private defendants is dismissed, this court lacks subject-matter jurisdiction to adjudicate claims against those defendants, regardless of whether the federal claims against the

state defendants survive the motion to dismiss. This court lacks diversity jurisdiction because parties on both sides are residents of the State of Hawaii or are doing business here, destroying complete diversity. As such, this court can only attempt to adjudicate this case under its federal question jurisdiction. 28 U.S.C. § 1331 (1982).

Plaintiffs' § 1983 claim provides the only basis for federal question jurisdiction. The complaint seeks declaratory judgment pursuant to 28 U.S.C. § 2201 (1982), but that federal statute merely provides a type of remedy; it provides no independent grounds for subject-matter jurisdiction where none already exists. Likewise Federal Rule of Civil Procedure Rule 19 (providing joinder of necessary and indispensable parties) does not provide an independent ground for jurisdiction. In fact, that rule only allows such joinder when it "will not deprive the court of jurisdiction over the subject matter of the action."

Plaintiffs' attempt to enforce the § 5(f) trust created by federal law does not "arise under" the laws of the United States and, thus, does not establish federal question jurisdiction. As already noted, § 5(f) provides no independent cause of action. Under Justice Holmes's formulation, this fact would defeat federal question jurisdiction since his formulation held that "[a] suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260, 36 S.Ct. 585, 586 (1916). This simple and comprehensible formulation, however, has not found universal application.

The Court of Appeals for the Ninth Circuit has provided much guidance in *Keaukaha I*, 588 F.2d 1216, 1224-27. In that case, the court was faced with the

issue of whether claims premised on the Hawaiian Homes Commission Act, 42 Stat. 108, (which also does not provide a private cause of action) arise under the laws of the United States. After a careful review of the unsettled and confusing body of law concerning "arising under" jurisdiction, the Court of Appeals held that such claims do not invoke federal question jurisdiction because the benefits under the Commission Act had lost their federal nature. Upon admission of Hawaii into the Union, the entire Commission Act program was turned over the State of Hawaii and the United States conveyed its interest in the home lands to the state, which are not administered by state officials. The appellate court concluded that the Commission Act and the rights and duties it created had become elements of Hawaiian state law. *Id.* at 1226.

The reasoning in *Keaukaha I* guides this court's evaluation of § 5(f) of the Admissions Act and leads to the conclusion that a suit to enforce the trust does not arise under the laws of the United States. Like those under the Commission Act, the rights and benefits under the Admissions Act have lost their federal nature. Upon admission as a state, the lands involved were conveyed to the State of Hawaii, and the State began to administer those public lands and the trust in which they were held. In fact, Congress authorized the Hawaiian legislature to decide the manner in which the § 5(f) lands, proceeds, and income must be managed and disposed of. The Admissions Act and the Commission Act are sufficiently similar that the holding in *Keaukaha I* applies to the instant case and compels the finding that a suit to enforce § 5(f) of the Admissions Act does not, in itself, arise under the laws of the United States.

Assuming that the claims against the state defendants survived the motion to dismiss, the court would still lack subject-matter jurisdiction to adjudicate the claims against the private defendants. Although the state defendants would face federal claims, the private defendants would face only state claims and would have no independent ground for jurisdiction. This court's pendant jurisdiction could not pick up the claims against the private defendants. Pendant jurisdiction is usually invoked when a single defendant faces both federal and state claims; the federal court asserts jurisdiction over the state claims in order to fully adjudicate a case that has a federal question. The doctrine of pendent jurisdiction allows a federal court to hear a nonfederal claim if it is closely related to the federal claim. Generally the nonfederal and federal claims must "derive from a common nucleus of operative fact" and be of such a nature that a claimant "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138 (1966).

Courts typically assert pendent jurisdiction when a single defendant faces both state and federal claims. This case, however, presents the atypical situation of "pendent parties" when there is a federal claim against one party but no independent ground for jurisdiction over a second party facing state claims which arise out of the same nucleus of operative facts as the federal claim.

The Supreme Court of the United States appears to disfavor the concept of asserting jurisdiction over "pendent parties" but has not yet firmly determined its validity. The court has, however, firmly determined its *invalidity* when invoked to retain a county as a defendant on the basis of a pending § 1983 claim against

another defendant. *Aldinger v. Howard*, 427 U.S. 1, 96 S.Ct. 2413 (1976). The Court disallowed jurisdiction over a pendant party only after it noted that, "[f]or the purposes of addressing the jurisdictional question in this case . . . we think it quite unnecessary to formulate any general, all-encompassing jurisdictional rule." *Id.*, at 13, 96 S.Ct. at 2419. To this end, the Court resolved the question of pendent-party jurisdiction by looking to the statutory language creating the federal cause of action in the particular case. The ability of the statute to permit pendent-party jurisdiction should be construed in light of the scope of the cause of action over which Congress has already extended federal-court jurisdiction. *Id.*, at 17, 96 S.Ct. at 2421. Limiting its holding to the Congressional purpose embodied in 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983, the Court held that a county facing state-law claims could not be joined as a pendent party to a § 1983 action since counties are excludable from the "person[s]" in § 1343(3) who can be held liable for constitutional deprivations. The Court rejected the notion that, despite the statute, Congress left federal courts free to create a jurisdictional doctrine enabling the courts to circumvent this exclusion of counties when the civil rights action and the state law claim arise from the same core of operative facts. *Id.*, at 16, 96 S.Ct. at 2421. Given the purpose of § 1983, the courts are similarly not free to circumvent the exclusion of private individuals or entities when the civil rights action and state-law claim arise out of a common nucleus of operative facts.

All claims against the private defendants fail. The complaint fails to state a § 1983 claim against the private defendants because it lacks any allegation that the private entity or individual was somehow working in

concert with the State or with some public official. Once the § 1983 fails, any other claims against the private defendants fall outside this court's subject-matter jurisdiction and must be dismissed under Rule 12(b)(1).

CONCLUSION

The court GRANTS both state defendants' and private defendants' motions to dismiss the complaints against them. The State of Hawaii and the state defendants in their official capacity are immunized from this suit by the Eleventh Amendment. The complaint fails to state a claim against the state defendants in their individual capacities. The complaint also fails to state a § 1983 claim against the private defendants as non-state actors and thus should be dismissed. Once that claim falls out, the court lacks subject matter jurisdiction over the claims against the private defendants. The court need not reach the motions for summary judgment.

Because the court dismisses the complaint and action against all parties, the court does not reach and need not address the defendants' motions in the alternative for summary judgment.

IT IS SO ORDERED

Dated: Honolulu, Hawaii, Dec. 7, 1989.

/s/ Harold M. Fong,
United States District Judge

Nos. 90-15117, 90-15863.

United States Court of Appeals

for the Ninth Circuit

Dr. Nui Loa PRICE, *et al.*

Plaintiff-Appellants,

v.

STATE OF HAWAII, *et al.*

Defendants-Appellees.

Filed August 8, 1991

ORDER

Before: BEEZER, NOONAN and FERNANDEZ, Circuit Judges.

The opinion filed in this case on July 11, 1991, is amended as follows: at page 8733 of the slip opinion the last line is amended to read: "AFFIRMED IN PART and REVERSED IN PART."

With the opinion thus amended, the panel has unanimously voted to deny the petition for rehearing.

The appellant's petition for rehearing is denied.

Nos. 90-15117, 90-15863.

United States Court of Appeals

for the Ninth Circuit

Dr. Nui Loa PRICE, *et al.*,

Plaintiff-Appellants,

v.

STATE OF HAWAII, *et al.*,

Defendants-Appellees.

Filed October 30, 1991

ORDER

Before: BEEZER, NOONAN and FERNANDEZ, Circuit Judges.

The panel has unanimously voted to deny the petition for rehearing filed by appellees, John Waihee, William W. Paty, Herbert K. Apaka, Jr., Moses W. Kealoha, J. Douglas Ing, John Arisumi, and Herbert Arata, which petition was styled "Appellee Hawaii Officials' Petition for Rehearing."

Therefore, the appellee Hawaii Officials' petition for rehearing is DENIED.

JUDGMENT

United States Court of Appeals

for the Ninth Circuit

Nos. 90-15117
CT/AG#: CV-89-0561-HMF

Dr. Nui Loa PRICE, aka Maui Loa, individually and in his capacity as chief of the Hou Hawaiians; The Hou Hawaiians, a Native Hawaiian Ohana; and Kamuela Price, individually, and In his capacity as member of the elder council of the Hou Hawaiians,

Plaintiffs-Appellants,

v.

STATE OF HAWAII, William W. Paty, individually and as Chairman of the Board of Land and Natural Resources of the State of Hawaii; Herbert K. Apaka, Jr.; Moses W. Kealoha; J. Douglas Ing; John Arisumi; Herbert Arata, individually and as Members of the Board of Land and Natural Resources of the State of Hawaii; John Waihee, individually and as Governor of the State of Hawaii; The Honolulu Sailors Home Society, a Hawaii non-profit corporation; HFSL Corp., a Hawaii corporation, dba Harbor Associates; Peter S. Smith, dba Smith Development Corp.; Glenn K. Okada, dba G.K.O. Corp.; and HonFed Bank, a federal savings bank,

Defendants-Appellees.

Nos. 90-15863.

CT/AG#: CV-89-0561-HMF

Dr. Nui Loa PRICE, aka Maui Loa, individually and in

his capacity as chief of the Hou Hawaiians; The Hou Hawaiians, a Native Hawaiian Ohana; and Kamuela Price, individually, and In his capacity as member of the elder council of the Hou Hawaiians,

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STATE OF HAWAII, William W. Paty, individually and as Chairman of the Board of Land and Natural Resources of the State of Hawaii; Herbert K. Apaka, Jr.; Moses W. Kealoha; J. Douglas Ing; John Arisumi; Herbert Arata, individually and as Members of the Board of Land and Natural Resources of the State of Hawaii; John Waihee, individually and as Governor of the State of Hawaii; The Honolulu Sailors Home Society, a Hawaii non-profit corporation; HFSL Corp., a Hawaii corporation, dba Harbor Associates; Peter S. Smith, dba Smith Development Corp.; Glenn K. Okada, dba G.K.O. Corp.; and HonFed Bank, a federal savings bank,

Defendants-Appellees.

APPEAL FROM the United States District Court for the U.S. District Court for the District of Hawaii.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the U.S. District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED in part, REVERSED in part.

Filed and entered: 07/11/91
Amended: 09/18/91